



US Army Corps
of Engineers
Sacramento District

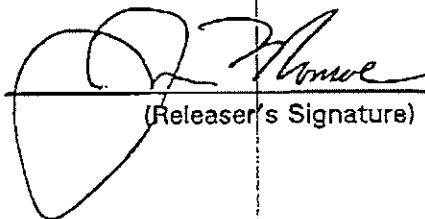
FACSIMILE HEADER SHEET

US Army Engineer District, Sacramento
1325 J Street
Sacramento, CA 95814-2922

October 2, 1998

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| TO: Tom Hagler, Esq. USEPA Region IX | Fax Phone: | (415) 744-1041 |
| | Voice Phone: | (415) 744-1375 |
| FROM: Jim Monroe Regulatory Branch (CESPK-CO-R) | Fax Phone: | (916) 557-6877 |
| | Voice Phone: | (916) 557-5266 |

Number of Pages to follow: 6



(Releaser's Signature)

COMMENTS:

Tom,

This is what went to the AG's office. My apologies for not ensuring that EPA got a copy. Could you also pass a copy along to Hugh Barroll.

In terms of meeting dates, October turns out to be already fairly booked up. The dates I am open are 13 OCT (pm); 14 OCT (am); and 21, 22, and 23 OCT (all day, at the moment). I need to coordinate this with Ros Tobe, to make sure she can make some, or all, of these dates as well.

REPLY TO
ATTENTION OF

DEPARTMENT OF THE ARMY
U.S. ARMY ENGINEER DISTRICT, SACRAMENTO
CORPS OF ENGINEERS
1325 J STREET
SACRAMENTO, CALIFORNIA 95814-2922

September 28, 1998

Office of Counsel

SUBJECT: Section 404 Determinations in Phase II, CALFED

Lisa Trankley Sato, Esq.
Deputy Attorney General
State of California
Department of Justice
Office of the Attorney General
1300 I Street, Suite 1101
P.O. Box 944255
Sacramento, CA 94244-2550

Dear Lisa:

Enclosed are the Corps of Engineers documents regarding 404 determinations in Phase II discussed at the CALFED 404 workgroup meeting on August 31, 1998.

1. Memoranda from Brigadier General Capka to Sacramento District Commander (Col. Klasse) dated 8 January 1998 regarding selection of a draft preferred alternative for CALFED Bay-Delta Program.
2. Memoranda for Record on CALFED conference call of July 16, 1998
3. Information Background on Section 404(b)(1) dated September 22, 1998

Please do not hesitate to give me a call if you have any questions. My number is (916) 557-6619. My e-mail address is "rtobe@spk.usace.army.mil". Thank you for your patience.

Sincerely,

A handwritten signature in cursive script, appearing to read "Roslyn", is written above the typed name.

Roslyn T. Tobe
Assistant District Counsel

cc: Jim Monroe (CESPK-CO-R)



REPLY TO
ATTENTION OF:

DEPARTMENT OF THE ARMY
SOUTH PACIFIC DIVISION, CORPS OF ENGINEERS
333 Market Street, Room 923
San Francisco, California 94105-2195

CESPD-ET-C

8 January 1998

MEMORANDUM FOR Commander, Sacramento District

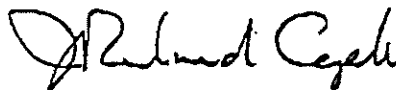
SUBJECT: SPK Regulatory Branch Concerns Regarding the Selection of a Draft Preferred Alternative for the CALFED Bay-Delta Program.

1. SPD staff have reviewed your memo of 10 November 1997, and attachments, in which your Regulatory staff identified two primary concerns related to the CALFED Bay-Delta Program. These concerns were provided at the request of SPD, and in advance of scheduled meetings with senior Federal agency representatives in Washington, D.C. on 9 December 1997, concerning the status and selection of a preferred alternative from the ClubFed perspective. Presently, the Draft Programmatic EIS/EIR is scheduled for public release in February 1998. I firmly believe your staff's concerns can be successfully addressed and resolved prior to that date. It is also my understanding that the Record of Decision for the Final Programmatic EIS/EIR will be signed by the Assistant Secretary of the Army (Civil Works) later in 1998.
2. To resolve the concerns, and review the solution options presented by your Regulatory Branch staff, SPD Construction-Operations and Office of Counsel staff reviewed a variety of regulations, statutes, and policies, and coordinated with their counterparts at HQUSACE to ensure the appropriate and consistent application of all applicable guidance, including holding several conference calls between HQUSACE, SPD, and SPK staff over the past few weeks.
3. First, to ensure future flexibility in the Corps' decision making on Department of the Army permit applications, a programmatic discussion of the Section 404(b)(1) Guidelines, including a generalized discussion of the PEIS winnowing process for the NEPA alternatives analysis, should be included with the Draft PEIS/EIR. However, the discussion of the Guidelines should not result in determinations under 40 CFR 230.10 or 230.11, including the determination of the least environmentally damaging practicable alternative. These determinations are only appropriate for the specific projects needing Corps permits in the future. Moreover, the discussion of the Guidelines in the PEIS should clearly state that the CALFED agencies view this analysis as an advanced planning process on a basin-wide basis, in accordance with the Section 404(b)(1) Guidelines at 40 CFR Part 230.80. Having the Section 404(b)(1) discussion as indicated above will minimize any duplicative review by the Corps' Regulatory Program of overall alternatives that were eliminated as part of the PEIS process.
4. Viewing the CALFED Bay-Delta Program as an advance planning process will also give SPK's Regulatory Branch much more flexibility with the Section 404(b)(1) alternatives analysis for project-specific decisions in the future, and allow Corps staff to focus on the least

environmentally damaging way to accomplish the specific portion of the CALFED Bay-Delta Program under any particular permit application, rather than reevaluating the programmatic options that CALFED is considering in the Draft PEIS/EIR. This "tiering" down from a programmatic Section 404(b)(1) advance planning effort, to project-specific Section 404(b)(1) alternatives analyses at a later date, is consistent with both the Section 404(b)(1) Guidelines and the Corps "NEPA Implementation Procedures for the Regulatory Program."

5. Secondly, the programmatic Section 404(b)(1) alternatives discussion should be commensurate with the evaluation of programmatic alternatives under NEPA in the Draft PEIS/EIR. As cited above, this is encouraged by both the Guidelines and the Corps' NEPA regulations for the Regulatory Program. To the extent that the Programmatic EIS/EIR covers issues and impacts associated with alternatives in a broad and general manner, so should the programmatic Section 404(b)(1) advance planning discussion. I strongly encourage you and your staff to ensure that the Draft PEIS/EIR fully discusses the screening process for the selection of programmatic alternatives evaluated in detail, as well as some discussion of the alternatives eliminated from further study to indicate that other options were considered. I am convinced that a broader view of "practicability" at the programmatic level under the Guidelines can be properly documented for the record. Here, I would further encourage you to seek assistance from our fellow ClubFed partners, in particular EPA and the U.S. Fish & Wildlife Service.

6. Finally, in the CALFED consensus-based approach to selecting a preferred programmatic alternative under NEPA, SPD will participate in that process for both the Draft and Final PEIS/EIR. However, to ensure that the Corps' Regulatory Program is not viewed as either an opponent or a proponent of CALFED's (the applicant's) final proposal, presently or during future project-specific evaluations for Department of the Army permitting purposes if needed, SPK or any other District in California, will not participate in the selection process of the preferred programmatic alternative.



J. RICHARD CAPKA
Brigadier General, U.S. Army
Commanding

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MFR. on CALFED Conference call of July 16, 1998

1. In attendance at the conference call were Lance Wood and Ted R ugiel from HQs, Mary Gillespie from SPD, and Ros Tobe, Jim Monroe, Art Champ and Tom Co e from SPK. The conference call was requested due to SPK's concerns with the appli cation of the 404(b)(1) Guidelines in the CALFED process. In addition, a meeting was sch. eduled in Washington, D.C. with the CALFED HQ agencies on July 21 and therefore Carl Enson wa s scheduled to prebrief Michael Davis in the Office of the Assistant Secretary of the Army for Civil Works. Furthermore, the concerns needed to be addressed because the CALFED decision on the preferred program alternative is scheduled for August 13-14.

2. To help with our discussions, I had previously sent via e-mail SPK's concerns regarding the selection of the CALFED preferred alternative under NEPA and the s election of the LEDPA under the 404(b)(1) Guidelines. HQs reviewed these documents and came to the following resolution:

The 404 Guidelines had flexibility in determining project pur pose and practicability, however, the application of this flexibility was a policy dec ision.

3. In summary, HQ's rationale was that a policy decision could be made to join the consensus and use a flexible approach in applying the 404 Guidelines so that there would be no disconnect between the NEPA preferred alternative and the 404 LEDPA. On the other hand, HQs also advised that a policy decision could also be made to use the 404 G uidelines as a big stick and let it run the CALFED selection process. At the conclusion of the discus sions, there were no objections voiced to this advice by any of the participants of the conference call.

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4. Mr. Enson was briefed on the conference call and made a policy decision that the 404 Guidelines would be applied in a flexible manner.

5. Mr. Enson then briefed Mr. Davis on CALFED and the adaptive management phased approach. He did not discuss the 404 issues that were presented to HQ's because he had already made the policy decision that the Corps would apply the 404 Guidelines in a flexible manner. The District has been informed of this decision.

INFORMATION BACKGROUND - SECTION 404(B)(1)

September 22, 1998

I. NEPA and Clean Water Act Section 404(b)(1)

Before the Corps makes a permit decision under Section 404 of the Clean Water Act, the Corps is required to review the applicant's proposed project, using the Section 404 (b)(1) Guidelines. The Corps must then make a factual determination of compliance with the Guidelines before a Section 404 permit may be issued.

All Department of Army (DA) permit actions require compliance with NEPA. The NEPA documentation will generally provide much, if not all, of the required documentation needed by the Corps to perform its independent analysis under Section 404(b)(1).

CALFED is currently at the programmatic stage of developing the NEPA documentation necessary, prior to moving ahead with the program. Ideally, their programmatic EIS will provide sufficient information under NEPA to allow projects that will be constructed during the program's implementation phase to tier off of the programmatic documentation for the project specific environmental documentation. Also, in order for the alternatives analysis under NEPA to be utilized in a Section 404(b)(1) analysis, the alternatives remaining at the project specific stage need to include all practicable alternatives.

The same would apply for Section 404 compliance, where the project specific NEPA documents, evaluated in light of the programmatic NEPA document, should provide sufficient information for the Corps to make a defensible determination of compliance with the Guidelines.

II. Permit Application Meetings

Typically, the Corps will meet with the applicant in a pre-application meeting to discuss the scope of the project, what types of permit(s) might be required and what type of documentation would need to accompany the permit. This can occur over more than one meeting.

III. Administrative Record

It is in CALFED's interest not to create an administrative record that supports any one alternative as being the LEDPA until the project specific stage. This will allow for sufficient information to be developed through the adaptive management approach being followed by CALFED in evaluating and selecting a preferred alternative. Development of this information will allow the Corps to fully carry out its responsibilities for ensuring compliance with the Guidelines on the basis of a complete administrative record, and without any past "changes in direction" that would have to be explained away.